

**United States Department of Labor  
Employees' Compensation Appeals Board**

---

**J.N., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Oklahoma City, OK, Employer**

---

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 10-1500  
Issued: April 12, 2011**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
ALEC J. KOROMILAS, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On May 11, 2010 appellant filed a timely appeal of a December 2, 2009 Office of Workers' Compensation Programs' merit decision denying an additional schedule award as well as an April 23, 2010 nonmerit decision denying an oral hearing request. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

**ISSUES**

The issues are: (1) whether appellant has more than 29 percent impairment of his right lower extremity for which he received a schedule award; and (2) whether the Branch of Hearings and Review properly denied appellant's request for an oral hearing as untimely.

**FACTUAL HISTORY**

On October 2, 1990 appellant, then a 33-year-old mail handler, filed a traumatic injury claim alleging that he sustained a back injury dumping sacks, lifting sacks and pushing

---

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

equipment in the performance of duty on September 28, 1990. On October 26, 1990 the Office accepted his claim for lumbar strain, herniated disc L4-5 and the resulting surgery on December 18, 1990 which included an L4 hemilaminectomy and discectomy L4-5 with decompressive foraminotomy L5-S1. It entered appellant on the periodic rolls on December 7, 1990.

The Office medical adviser reviewed appellant's claim on April 29, 1996 and found that he had 29 percent right lower extremity impairment due to leg muscle atrophy, unilateral spinal nerve root impairment and pain or sensory deficit based on his accepted conditions of failed back syndrome, discectomy L4-5 and L5-S1 as well as right knee arthritis and chronic pain disorder. By decision dated May 6, 1996, the Office granted him a schedule award for 29 percent impairment of his right lower extremity. The Branch of Hearings and Review affirmed this decision on April 15, 1997.

Dr. C.L. Soo, a Board-certified orthopedic surgeon, examined appellant on May 5, 2005 and stated that a functional capacity evaluation dated April 28, 2005 determined that appellant was able to work at a sedentary to light position eight hours a day. The Office referred appellant for vocational rehabilitation. In a letter dated April 27, 2006, it proposed to reduce his compensation benefits to zero based on his capacity to earn wages in the constructed position of mail handler. By decision dated June 8, 2006, the Office finalized the wage-earning determination. It declined to reopen this decision for consideration of the merits on July 27, 2006.

Appellant requested an additional schedule award on October 3 and 10, 2006. In support of this request, he submitted a form report dated January 2, 1998 from Dr. John B. Hughes, an osteopath, diagnosing failed back syndrome and opining that appellant had 30 percent impairment "to the body for work."

Dr. Soo completed a report on September 21, 2006 and listed appellant's conditions as lumbar degenerative disc disease at L2-3, L3-4 and L4-5 and L5-S1 with a right-sided L4-5 disc herniation causing bilateral neuroforaminal stenosis of L4-5. He noted that in addition to his chronic right leg pain, appellant reported progressively increasing pain in his right lower extremity radiating into his right hip and down the lateral portion his right leg to the foot. Appellant also reported weakness in the right leg and footdrop with atrophy of the right thigh muscles. On October 5, 2006 Dr. Soo reviewed a September 28, 2006 magnetic resonance imaging scan and found a worsening of the disc herniation at L4-5 with more calcification as well as spondylolisthesis over L5-S1. He recommended additional surgery.

The Office asked Dr. Soo to provide an impairment rating for appellant's lower extremities based on his accepted condition on December 28, 2006. In a report dated March 15, 2007, Dr. Soo stated that appellant had 10 percent extremity impairment based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.<sup>2</sup>

The Office medical adviser reviewed this report on May 2, 2007 and noted that Dr. Soo based his impairment rating on one percent sensory loss and nine percent motor loss, but did not

---

<sup>2</sup> A.M.A., *Guides*, 5<sup>th</sup> ed. (2001).

provide the nerve roots involved. He requested a supplemental report from Dr. Soo addressing the specific nerve roots or a second opinion evaluation regarding appellant's permanent impairment.

On May 14, 2007 the Office asked appellant to secure a supplemental report from Dr. Soo, who responded on May 24, 2007 and noted that the impairment rating was based on the fifth edition of the A.M.A., *Guides*. Dr. Soo stated, "The nerve root involved will be L5 and S1." The Office medical adviser reviewed this report and stated that he could not determine an impairment rating based on this information. He requested a second opinion evaluation. Dr. Soo responded on August 31, 2007 and stated that he could not provide the information requested by the Office medical adviser.

The Office referred appellant for a second opinion evaluation with Dr. Michael Shawn Smith, a physician Board-certified in physical medicine and rehabilitation, on January 7, 2008. In his January 7, 2008 report, Dr. Smith reported appellant's history of injury and medical history. He examined appellant and found a normal gait, but evidence of wear on the right toe from dragging. Dr. Smith found consistent weakness in dorsiflexion and mild weakness in plantar flexion. He noted mild atrophy below the knee and decreased sensation to pinprick and pinwheel response in the whole right lower extremity which was consistent in L4-5 and S1 distribution of the right lower calf and ankle. Dr. Smith diagnosed chronic L4-5 radiculopathy of the right lower extremity with weakness, atrophy and numbness as well as "symptomatic demarcation proximally in the upper leg and thigh." He concluded that appellant had nine percent lower extremity impairment in the right lower extremity as a result of appellant's accepted back conditions.

By decision dated January 30, 2008, the Office denied appellant's claim for an additional schedule award based on Dr. Smith's report. It noted that he currently had nine percent impairment of the right lower extremity and had previously received a schedule award for 29 percent impairment of this scheduled member.

Appellant requested a review of the written record on February 6, 2008.

In a telephone memorandum dated June 30, 2008, the Office stated that the schedule award was denied in error and that the claims examiner should have sent the case to the Office medical adviser for review. It then referred appellant's claim to the Office medical adviser who completed a report on July 16, 2008 and stated, "I assume the 29 percent [permanent partial impairment] of the [right lower extremity] was due to spine abnormality because there was no mention of any other factor: nevertheless, the earlier award should be reviewed." On August 11, 2008 the Office medical adviser stated that the 1996 schedule award for 29 percent impairment was based on motor and sensory deficits of the right lower extremity and that appellant's current impairment rating of 9 percent was also based on motor and sensory deficits. He concluded that no award for the right lower extremity was due.

By decision dated August 20, 2008, the Office again denied appellant's request for an additional schedule award. Appellant completed an appeal request form on August 27, 2008 and requested an oral hearing, a review of the written record and reconsideration. On September 4, 2008 the Office requested that he select one avenue of appeal. Appellant completed an appeal request form on September 10, 2008 and requested a review of the written record. By decision dated March 19, 2009, the Branch of Hearings and Review vacated the Office's August 20, 2008

decision finding that the Office medical adviser had failed to provide an impairment rating based on Dr. Smith's report. The Branch of Hearings and Review remanded the case for the Office medical adviser to review the medical evidence and provide an opinion regarding the extent of appellant's right lower extremity impairment.

In accordance with the hearing representative's directive, the Office requested a supplemental report from the Office medical adviser on November 9, 2009. The Office medical adviser completed a report on November 20, 2009 and reviewed Dr. Soo's report citing to page 552 of the A.M.A., *Guides*, Table 17-37 for sensory loss, and page 482, Table 16-10 to grade the extent of loss. He rated appellant's motor loss of the peroneal nerve through page 552 of the A.M.A., *Guides*, Table 17-37. The Office medical adviser concluded that Dr. Soo utilized the sural, superficial peroneal and sciatic nerves in rating appellant's impairment, when only the sciatic nerve was appropriate, and reduced appellant's impairment rating to seven percent.

Dr. Soo completed a report on November 5, 2009 and opined that appellant had reached maximum medical improvement in 2006. He noted that appellant had decreased strength and sensation in the right lower extremity. Dr. Soo found that under the fifth edition of the A.M.A., *Guides* appellant had one percent impairment of the right lower extremity due to sensory loss and nine percent impairment due to motor deficit for a total of 10 percent impairment. He noted, "[I]n the lumbar spine, therefore it is very difficult to say of peroneal nerve involvement however, the lumbar nerve eventually becomes a peroneal nerve therefore he will have involvement of most likely to be L4, L5-S1 nerve or peroneal nerve and tibial nerve."

By decision dated December 2, 2009, the Office denied appellant's claim for an additional schedule award finding that the weight of the evidence did not establish an impairment rating of more than 29 percent of the right lower extremity.

Appellant submitted additional new evidence and requested a review of the written record on March 18, 2010. By decision dated April 23, 2010, the Branch of Hearings and Review denied appellant's request for a review of the written record finding that his request was not made within 30 days of the Office's December 2, 2009 decision. The Branch of Hearings and Review further determined that the issue in the case could equally well be addressed by requesting reconsideration from the district Office and submitted evidence not previously considered which established that appellant had a greater percentage of disability than previously awarded.

### **LEGAL PRECEDENT -- ISSUE 1**

The schedule award provision of the Act<sup>3</sup> and its implementing regulations<sup>4</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss or loss of use, of scheduled members or functions of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The Office evaluates

---

<sup>3</sup> 5 U.S.C. §§ 8101-8193, 8107.

<sup>4</sup> 20 C.F.R. § 10.404.

the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*. As of May 1, 2009, any decision regarding a schedule award must be based on the sixth edition.<sup>5</sup> The Board has adopted the Office's finding that any recalculations of previous awards which result from hearing or reconsideration decisions issued on or after May 1, 2009, should be based on the sixth edition of the A.M.A., *Guides*.<sup>6</sup>

The Act does not authorize the payment of schedule awards for the permanent impairment of the whole person.<sup>7</sup> Payment is authorized only for the permanent impairment of specified members, organs or functions of the body.

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the regulations.<sup>8</sup> Because neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or spine,<sup>9</sup> no claimant is entitled to such an award.<sup>10</sup>

Amendments to the Act, however, modified the schedule award provisions to provide for an award for permanent impairment to a member of the body not covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. As the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to a limb even though the cause of the impairment originated in the spine.<sup>11</sup>

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. Recognizing that certain jurisdictions, such as federal claims under the Act, mandate ratings for extremities and preclude ratings for the spine, the A.M.A., *Guides* has offered an approach to rating spinal nerve impairments consistent with sixth edition methodology.<sup>12</sup> The Office has adopted this approach for rating impairment of the upper or lower extremities caused by a spinal injury, as provided in Chapter 3.700 of its procedures.<sup>13</sup> Specifically, it will address lower extremity impairments originating in the spine

---

<sup>5</sup> 20 C.F.R. § 10.404. For impairment ratings calculated on and after May 1, 2009, the Office should advise any physician evaluating permanent impairment to use the sixth edition. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6.a (January 2010).

<sup>6</sup> C.K., Docket No. 09-2371 (issued August 18, 2010).

<sup>7</sup> Ernest P. Govednick, 27 ECAB 77 (1975); W.D., Docket No. 10-274 (issued September 3, 2010).

<sup>8</sup> William Edwin Muir, 27 ECAB 579 (1976); W.D., *supra* note 7.

<sup>9</sup> The Act itself specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19).

<sup>10</sup> Timothy J. McGuire, 34 ECAB 189 (1982); W.D., *supra* note 7.

<sup>11</sup> Rozella L. Skinner, 37 ECAB 398 (1986); W.D., *supra* note 7.

<sup>12</sup> FECA Transmittal No. 10-04 (issued January 9, 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Exhibit 4 (January 2010).

<sup>13</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (Exhibits 1, 4) (January 2010).

through Table 16-11<sup>14</sup> and upper extremity impairment originating in the spine through Table 15-14.<sup>15</sup>

In addressing lower extremity impairments, the sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE) and clinical studies (GMCS). The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>16</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that this case is not in posture for decision.

Office procedures provide that, effective May 1, 2009, all schedule awards are to be calculated under the sixth edition of the A.M.A., *Guides*. The bulletin clarifies that any recalculations of previous awards which result from hearings or reconsideration decisions issued on or after May 1, 2009, should be based on the sixth edition of the A.M.A., *Guides*. The bulletin notes, a claimant who has received a schedule award calculated under a previous edition and who claims an increased award, will receive a calculation according to the sixth edition for any decision issued on or after May 1, 2009.<sup>17</sup>

The Office requested a supplemental report from the Office medical adviser on November 9, 2009. In his November 20, 2009 report, the Office medical adviser evaluated appellant's impairment in accordance with the fifth edition of the A.M.A., *Guides*. Although he did not specify the edition of the A.M.A., *Guides* he utilized, the tables and pages he cited correlate with the fifth rather than the sixth edition of the A.M.A., *Guides*. The sixth edition of the A.M.A., *Guides*, does not have a table on page 552. Furthermore, page 484 of the sixth edition is located in the upper extremity chapter. Table 17-37 does not exist in the sixth edition while Table 16-11 is located on page 533 rather than 484 and is entitled *Sensory and Motor Severity*. Dr. Soo's November 5, 2009 report is explicitly based on an evaluation under the fifth edition of the A.M.A., *Guides*, rather than the appropriate sixth edition. As these reports and the Office's December 2, 2009 decision were issued after May 1, 2009 and related to a request for an additional schedule award, the evaluation should have been based on the sixth edition of the A.M.A., *Guides*. Due to this deficiency in the medical evidence, the lack of medical opinion evidence correlating appellant's permanent impairment with the appropriate edition of the A.M.A., *Guides*, the Board finds that the case must be remanded for additional development of the medical evidence. On remand the Office should refer the medical evidence to a new Office medical adviser and request a report addressing appellant's permanent impairment in accordance with the standards of the sixth edition of the A.M.A., *Guides*. After this and such other development as it deems necessary, the Office should issue an appropriate decision.<sup>18</sup>

---

<sup>14</sup> A.M.A., *Guides* 533, Table 16-11.

<sup>15</sup> *Id.* at 425, Table 15-14.

<sup>16</sup> *Id.* at 521. *J.B.*, Docket No. 09-2191 (issued May 14, 2010).

<sup>17</sup> *C.K.*, *supra* note 7.

<sup>18</sup> Due to the disposition of this issue, it is not necessary for the Board to address the nonmerit issue in this case.

### **CONCLUSION**

The Board finds that the case is not in posture for decision and must be remanded for additional development of the medical evidence.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the April 23, 2010 and December 2, 2009 decisions of the Office of Workers' Compensation Programs are set aside and remanded for further development consistent with this decision of the Board.

Issued: April 12, 2011  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board